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# THOUGHTS ON THE RELATIONSHIP BETWEEN THE SUPREME COURT AND THE FEDERAL CIRCUIT

THE HONORABLE TIMOTHY B. DYK*

## INTRODUCTION

This Article is adapted from my September 22, 2016 address to the Supreme Court IP Review at the Chicago-Kent College of Law. The views expressed are, of course, my own. And you will forgive me for not predicting our circuit decisions for the coming year; circuit judges are more comfortable discussing the Supreme Court's jurisprudence than their own.

These are some thoughts on the relationship between the Supreme Court and our court, the United States Court of Appeals for the Federal Circuit, in no particular order.

## I

The Supreme Court takes a lot of our cases.[1] About a decade ago I wrote a forward to the American University Law Review annual issue on the Federal Circuit.[2] I predicted that the Supreme Court would continue to take our cases, and that many of those cases would involve substantive patent law.[3] That proved to be prescient, but it was easy to predict.

In the past ten years, the Supreme Court has taken an average of four of our cases each term, representing 5.4% of the Court's merits cases.[4] A large proportion of those cases have involved substantive patent law or related procedural issues.[5]

*Circuit Judge, United States Court of Appeals for the Federal Circuit. I thank my law clerk, Giovanni S. Saarman González, for his excellent research assistance.

1. *See infra* Table 1.

2. Hon. Timothy B. Dyk, *Does the Supreme Court Still Matter?*, 57 AM. U. L. REV. 763 (2008).

3. *See id.* at 763–64 ("Like it or not, however, the Supreme Court's role in th[e intellectual property] area will continue, and the bar must heed the Greek proverb—to accept that which we cannot change.").

4. *See infra* Table 1. From OT 2006 to OT 2015 the Supreme Court averaged 4 merits cases from the Federal Circuit.

5. *See, e.g.*, Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131 (2016); Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923 (2016); Commil USA, LLC v. Cisco Sys., Inc., 135 S. Ct. 1920 (2015); Teva Pharms. USA, Inc. v. Sandoz, Inc., 135 S. Ct. 831 (2015); Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 134 S. Ct. 2347 (2014); Limelight Networks, Inc. v. Akamai Techs., Inc., 134 S. Ct. 2111 (2014); Nautilus, Inc. v. Biosig Instruments, Inc., 134 S. Ct. 2120 (2014); Highmark Inc. v. Allcare Health

In this respect, over the past ten October Terms ("OT"), our court has represented the median among the circuits.[6] In absolute terms, the Supreme Court has taken comparatively more cases from the Second, Fifth, Sixth, Ninth and Eleventh Circuits, and comparatively fewer from the First, Third, Seventh, Eighth, Tenth, and, surprisingly, District of Columbia Circuits. At the extremes, the Ninth Circuit overwhelmingly dominated, accounting for 22% of the Court's merits cases, while the First Circuit made up just 2.8%. However, if one considers the total number of cases decided by each circuit, comparatively more of our cases were taken by the Supreme Court than any other circuit, with the D.C. Circuit as a close second.[7] The Supreme Court reviewed 0.28% of total appeals terminated in our court and 0.26% for the D.C. Circuit. The third most reviewed circuit was the First Circuit, but its rate was only half that of the D.C. Circuit at 0.13%. In other words, the Supreme Court was significantly more likely to review cases from our court and the D.C. Circuit than from any of the other circuits.

Mgmt. Sys., Inc., 134 S. Ct. 1744 (2014); Octane Fitness, LLC v. Icon Health & Fitness, Inc., 134 S. Ct. 1749 (2014); Medtronic, Inc. v. Mirowski Family Ventures, LLC, 134 S. Ct. 843 (2014); Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013); Bowman v. Monsanto Co., 133 S. Ct. 1761 (2013); Kappos v. Hyatt, 132 S. Ct. 1690 (2012); Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 132 S. Ct. 1670 (2012); Mayo Collaborative Servs. v. Prometheus Labs., Inc., 132 S. Ct. 1289 (2012); Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91 (2011); Board of Tr. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 563 U.S. 776 (2011); Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754 (2011); Bilski v. Kappos, 561 U.S. 593 (2010); Quanta Comput., Inc. v. LG Elecs., Inc., 553 U.S. 617 (2008); KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398 (2007); Microsoft Corp. v. AT&T Corp., 550 U.S. 437 (2007); MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007).

6. *See infra* Table 1.

7. *See infra* Table 1. There is wide variation in the total number of cases decided by each circuit (total appeals terminated) over this period, from just under 12,000 in the D.C. Circuit to nearly 129,000 in the Ninth Circuit. Accounting for this variation provides a more helpful measure of the likelihood of Supreme Court review on a per case basis.

| Court | Total Cases | Percent of All Merits Cases | Average Cases per OT | Total Appeals Terminated | Percent of Total Appeals Terminated |
|---|---|---|---|---|---|
| First | 21 | 2.84% | 2.1 | 16,522 | 0.127% |
| Second | 55 | 7.43% | 5.5 | 62,269 | 0.088% |
| Third | 33 | 4.46% | 3.3 | 39,464 | 0.084% |
| Fourth | 40 | 5.41% | 4 | 50,306 | 0.080% |
| Fifth | 59 | 7.97% | 5.9 | 79,444 | 0.074% |
| Sixth | 55 | 7.43% | 5.5 | 49,641 | 0.111% |
| Seventh | 39 | 5.27% | 3.9 | 32,149 | 0.121% |
| Eighth | 34 | 4.59% | 3.4 | 30,926 | 0.110% |
| Ninth | 160 | 21.62% | 16 | 128,635 | 0.124% |
| Tenth | 28 | 3.78% | 2.8 | 23,500 | 0.119% |
| Eleventh | 48 | 6.49% | 4.8 | 66,653 | 0.072% |
| D.C. | 31 | 4.19% | 3.1 | 11,798 | 0.263% |
| Federal | 40 | 5.41% | 4 | 14,343 | 0.279% |
| All Circuits | 641 | 86.62% | 64.1 | 604,909 | 0.106% |
| All Merits Cases | 740 | 100.00% | 74 | | |
| Circuit Median | 40 | 5.41% | 4 | | |

**TABLE 1:** OT 2006–2015: Supreme Court Review Rate by Circuit[8]

8. The Total Cases column is generated from the annual statistics on the Supreme Court published by the Harvard Law Review. This column sums the number of "Full Opinions" for OT 2006 through OT 2015, which include the Court's merits opinions and those per curiam opinions "containing sufficient legal reasoning to be counted as full opinions." *See The Statistics*, 130 HARV. L. REV. 507, 516 tbl. 2(E) (2016); *The Statistics*, 129 HARV. L. REV. 381, 391 tbl. 2(E) (2015); *The Statistics*, 128 HARV. L. REV. 401, 411 tbl. 2(E) (2014); *The Statistics*, 127 HARV. L. REV. 408, 418 tbl. 2(E) (2013); *The Statistics*, 126 HARV. L. REV. 338, 397 tbl. 2(E) (2012); *The Statistics*, 125 HARV. L. REV. 362, 371 tbl. 2(E) (2011); *The Statistics*, 124 HARV. L. REV. 411, 420 tbl. 2(E) (2010); *The Statistics*, 123 HARV. L. REV. 382, 391 tbl. 2(E) (2009); *The Statistics*, 122 HARV. L. REV. 516, 525 tbl. 2(E) (2008); *The Statistics*, 121 HARV. L. REV. 436, 445 tbl. 2(E) (2007).

The Total Appeals Terminated column sums the number of appeals terminated in a given Circuit for Fiscal Year 2006 through Fiscal Year 2015 (which represents the time period from October 1, 2005 to September 30, 2015). This is offset—beginning and ending one year earlier—from the period of Supreme Court review (OT 2006 through OT 2015). This approach is consistent with the methodology used by others in the literature and "approximates the lag between the date that a case is decided by a court of appeals and the date that the case is reviewed and disposed of by the Supreme Court." Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeal*, 2 LANDSLIDE 8, 11 n.6 (2010). With the exception of the Federal Circuit, these data are drawn from statistics published by USCourts.gov. *See Federal Court Management Statistics—Profiles*, USCOURTS (Sept. 30, 2015), http://www.uscourts.gov/file/19793; *Federal Court Management Statistics—Profiles*, USCOURTS (Sept. 30, 2010), http://www.uscourts.gov/file/13930. Data for the Federal Circuit is from the court's website. *See Table B-8. U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending*, CAFC.USCOURTS (Sept. 30, 2015), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/appeals_filed_terminated_and_pending.pdf; *Table B-8. U.S. Court of Appeals for the*

For the coming term, the Supreme Court has already granted certiorari in four of our patent cases and in one trademark case: 1. *SCA Hygiene Products Aktiebolag v. First Quality Baby Products*[9] (which raises the question "[w]hether and to what extent the defense of laches may bar a claim for patent infringement . . ., 35 U.S.C. § 286"[10]); 2. *Samsung Electronics v. Apple*[11] (where the Court recently decided that for multi-component products, the relevant "article of manufacture" under 35 U.S.C. § 289 covered by a design patent can "encompass[] both a product sold to a consumer and a component of that product"[12]); 3. *Life Technologies Corp. v. Promega Corp.*[13] (which raises the question "[w]hether the Federal Circuit erred in holding that supplying a single, commodity component of a multi-component invention from the United States is an infringing act under 35 U.S.C. § 271(f)(1), exposing the

*Federal Circuit—Appeals Filed, Terminated, and Pending*, CAFC.USCOURTS (Sept. 30, 2014), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/appeals_filed_terminated_pending_2014.pdf; *Table B-8. U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending*, CAFC.USCOURTS (Sept. 30, 2013), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/FY13/appeals%20filed%20term%20pend%209.30.13.pdf; *Table B-8. U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending*, CAFC.USCOURTS (Sept. 30, 2012), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/Appeals_Filed_Terminated_and_Pending_2012_REV.pdf; *Table B-8. U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending*, CAFC.USCOURTS (Sept. 30, 2011), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/Appeals_Filed_Term_Pend_2011.pdf; *Table B-8. U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending*, CAFC.USCOURTS (Sept. 30, 2010), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/Appeals_Filed_Terminated_and_Pending_2010.pdf; *Table B-8. U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending*, CAFC.USCourts (Sept. 30, 2009), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/b08sep09.pdf; *Table B-8. U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending*, CAFC.USCOURTS (Sept. 30, 2008), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/b08sep08.pdf; *Table B-8. U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending*, CAFC.USCOURTS (Sept. 30, 2007), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/b08sep07.pdf; *Table B-8. U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending*, CAFC.USCOURTS (Sept. 30, 2006), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/ao0906.pdf.

9. SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., 807 F.3d 1311 (Fed. Cir. 2015), 136 S. Ct. 1824 (2016) (granting certiorari).

10. *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/sca-hygiene-products-aktiebolag-v-first-quality-baby-products-llc/ (last visited Dec. 2, 2016).

11. Apple Inc. v. Samsung Elecs. Co., Ltd., 786 F.3d 983 (Fed. Cir. 2015), 136 S. Ct. 1453 (2016) (granting certiorari).

12. Samsung Elecs. Co., Ltd. v. Apple Inc., No. 15–777, slip. op. at 6 (U.S. Dec. 6, 2016).

13. Promega Corp. v. Life Techs. Corp., 773 F.3d 1338 (Fed. Cir. 2014), 136 S. Ct. 2505 (2016) (granting certiorari).

manufacturer to liability for all worldwide sales"[14]); 4. *Impression Products v. Lexmark International*[15] (which raises questions regarding the domestic and international exhaustion of patent rights)[16]; and 5. *Lee v. Tam*[17] (which raises the question "[w]hether the disparagement provision of the Lanham Act, 15 U.S.C. 1052(a), . . . is facially invalid under the Free Speech Clause of the First Amendment"[18]). There are also other patent cases that are candidates for a grant during the term. In one of our cases where a petition was filed, the Court has requested the views of the Solicitor General.[19]

I continue to believe that Supreme Court review of our patent cases has been critical to the development of patent law and likewise beneficial to our court. "The Supreme Court necessarily plays a critical role in reinterpreting, or even overruling, earlier Supreme Court decisions and in altering our jurisprudence to keep up with the demands of a changing world."[20]

## II

Considering the number of cases—and substantive patent cases in particular—that the Court has taken, one might ask how our court has fared in Supreme Court review. Are we, in other words, a "rogue" court of appeals as some have suggested?[21] In general, the reversal rate for our court is comparable to the other circuits. Although one study of OT 1999 to OT 2008 calculated the median reversal rate for the circuits at around 68% and our court's reversal rate at 83%, this rate has declined in recent years.[22] Over the last ten terms, our reversal rate has averaged around 70%, just

14. *Life Technologies Corporation v. Promega Corporation*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/life-technologies-corporation-v-promega-corporation/ (last visited Dec. 2, 2016).

15. *Lexmark Int'l, Inc. v. Impression Prods., Inc.*, 816 F.3d 721 (Fed. Cir. 2016) (en banc), No. 15-1189 (U.S. Dec. 2, 2016) (granting certiorari).

16. *Impression Products v. Lexmark International*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/impression-products-inc-v-lexmark-international-inc/ (last visited Dec. 2, 2016).

17. *In re* Tam, 808 F.3d 1321 (Fed. Cir. 2015), *sub nom. Lee v. Tam*, 2016 WL 1587871 (Sep. 29, 2016) (granting certiorari).

18. *Lee v. Tam*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/lee-v-tam/ (last visited Dec. 2, 2016).

19. *See Amgen Inc. v. Sandoz Inc.*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/amgen-inc-v-sandoz-inc/.

20. Dyk, *supra* note 2, at 768.

21. *E.g.*, Timothy B. Lee, *How a Rogue Appeals Court Wrecked the Patent System*, ARSTECHNICA (Sept. 30, 2012), http://arstechnica.com/tech-policy/2012/09/how-a-rogue-appeals-court-wrecked-the-patent-system/.

22. *Compare* Hofer, *supra* note 8, *with* Roy E. Hofer & Joshua H. James, *Supreme Court Reversal Rates for Federal Circuit Cases*, 6 LANDSLIDE 40, 40–41 (2014), *and infra* Table 2.

slightly above the circuit median of 66.7%.[23] At the outer bounds are the Sixth and Ninth Circuits, with reversal rates of 83.6% and 81.3% respectively, and the First Circuit, with a reversal rate of 47.6%.

| Court | Total Cases | Reversed | Vacated | Affirmed | R & V Rate |
|---|---|---|---|---|---|
| First | 21 | 9 | 1 | 11 | 47.62% |
| Second | 55 | 30 | 5 | 20 | 63.64% |
| Third | 33 | 16 | 6 | 11 | 66.67% |
| Fourth | 40 | 14 | 10 | 16 | 60.00% |
| Fifth | 59 | 31 | 12 | 16 | 72.88% |
| Sixth | 55 | 38 | 8 | 9 | 83.64% |
| Seventh | 39 | 14 | 10 | 15 | 61.54% |
| Eighth | 34 | 22 | 5 | 7 | 79.41% |
| Ninth | 160 | 106 | 24 | 30 | 81.25% |
| Tenth | 28 | 11 | 6 | 11 | 60.71% |
| Eleventh | 48 | 25 | 10 | 13 | 72.92% |
| D.C. | 31 | 14 | 6 | 11 | 64.52% |
| Federal | 40 | 21 | 7 | 12 | 70.00% |
| All Circuits | 641 | 350 | 110 | 181 | 71.76% |
| All Merits Cases | 740 | 414 | 123 | 203 | 72.57% |
| Circuit Median | 40 | | | | 66.67% |

**TABLE 2:** OT 2006–2015: Reversal Rate on Merits Cases by Circuit[24]

## III

The Supreme Court's decisions have had a major impact on patent law. Some—*Zurko*[25] and *Teva*[26] come to mind—may not have had a significant impact. But most of the Court's cases have involved important and foundational questions with enormous impacts on patent litigation. For instance, the Court's decisions in *Alice*,[27] *Mayo*,[28] *Bilski*,[29] and *Myriad*[30]

23. *See infra* Table 2.

24. *See supra* note 8 regarding how the Total Cases column was determined. The data for the Reversed, Vacated, and Affirmed columns were likewise drawn from the annual statistics published by the Harvard Law Review.

25. Dickinson v. Zurko, 527 U.S. 150 (1999).

26. Teva Pharms., USA, Inc. v. Sandoz Inc., 135 S. Ct. 831 (2015).

27. Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 134 S. Ct. 2347 (2014).

28. Mayo Collaborative Servs. v. Prometheus Labs., Inc., 132 S. Ct. 1289 (2012).

29. Bilski v. Kappos, 561 U.S. 593 (2010).

30. Ass'n for Molecular Pathology v. Myriad Genetics, 133 S. Ct. 2107 (2013).

have reshaped the legal landscape for determining subject matter eligibility under § 101.[31]

With respect to patent validity, the Court's decisions in *KSR*[32] and *Nautilus*[33] have similarly reshaped the legal standards for determining obviousness under § 103[34] and indefiniteness under § 112.[35]

On the issue of infringement, the Court's opinions in *Global-Tech*,[36] *Limelight*,[37] *Commil*,[38] and *Microsoft v. AT&T*,[39] have impacted the liability of accused infringers. *Global Tech* set forth the legal standard for induced infringement, requiring knowledge that the induced acts constitute patent infringement.[40] Then, *Limelight* and *Commil* clarified that underlying direct infringement is a prerequisite to induced infringement liability[41] and that a good-faith belief of patent invalidity is not a defense.[42] And, relatedly, in *Microsoft v. AT&T* the Court circumscribed liability for extraterritorial infringement under § 271(f).[43]

Again with respect to infringer liability, the Court's decisions in *Warner-Jenkinson*[44] and *Festo*[45] on prosecution history estoppel and the doctrine of equivalents have also had far reaching implications.

Another group of recent cases has reshaped the remedies available to patent owners and accused infringers. In *Medimmune*[46] and *Medtronic*[47] the Court expanded the availability of declaratory judgment actions for accused infringers. The Court's decision in *Caraco*[48] defined the counterclaim provision of the Hatch-Waxman Act, expanding declaratory judgment jurisdiction for generic manufacturers. The Court's opinion in *eBay*[49] dramatically changed the standards for permanent injunctions. The Court

31. 35 U.S.C. § 101 (2012).
32. KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398 (2007).
33. Nautilus, Inc. v. Biosig Instruments, Inc., 134 S. Ct. 2120 (2014).
34. 35 U.S.C. § 103 (2012).
35. 35 U.S.C. § 112 (2012).
36. Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754 (2011).
37. Limelight Networks, Inc. v. Akamai Techs., Inc., 134 S. Ct. 2111 (2014).
38. Commil USA, LLC v. Cisco Sys., Inc., 135 S. Ct. 1920 (2015).
39. Microsoft Corp. v. AT&T Corp., 550 U.S. 437 (2007).
40. *Global-Tech*, 563 U.S. at 766.
41. *Limelight*,134 S. Ct. at 2117–18.
42. *Commil*, 135 S. Ct. at 1928.
43. *Microsoft Corp.*, 550 U.S. at 449–54; *see also* 35 U.S.C. § 271(f) (2012).
44. Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co., 520 U.S. 17 (1997).
45. Festo Corp. v. Shoketsu Kinzoku Koygo Kabushiki Co., Ltd., 535 U.S. 722 (2002).
46. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007).
47. Medtronic, Inc. v. Mirowski Family Ventures, LLC, 134 S. Ct. 843 (2014).
48. Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 132 S. Ct. 1670 (2012).
49. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

set forth the legal standard for awarding enhanced damages under 35 U.S.C. § 284 in the recent *Halo* opinion,[50] clarifying that objective unreasonableness is not a legal prerequisite. Similarly, *Octane Fitness*[51] and *Highmark*[52] established the legal standard for determining "exceptional cases" under the fee shifting provision of the Patent Act,[53] and the appropriate standard for our court to review a district court's fee shifting determination on appeal.[54]

Finally, two other recent decisions, *Kappos*[55] and *Cuozzo*,[56] have also clarified the procedures for relief from decisions by the United States Patent and Trademark Office (Patent Office). *Kappos* of course considered the ability to introduce new evidence in 35 U.S.C. § 145 proceedings,[57] and *Cuozzo* construed the provision of the Leahy-Smith America Invents Act that bars appellate review of the Patent Office's decision to institute inter partes review proceedings.[58]

## IV

Apart from the substantive impact of Supreme Court decisions, when the Supreme Court reviews our cases, the very fact of its review directs attention to the issue addressed by the Court and alters the course of litigation, affecting both the issues raised in the districts courts and the Patent Office and those subsequently argued on appeal. Two recent examples illustrate this phenomenon. Before the Supreme Court's decisions in *Bilski*,[59] *Mayo*,[60] *Myriad*,[61] and *Alice*,[62] challenges to patentability based on 35 U.S.C. § 101 were rare. Those challenges now consume a significant portion of our docket. For instance, Table 3 compares the five year periods before and after the Supreme Court's decision in *Bilski*; the number of § 101 cases on our docket has increased nearly 60%. This is especially true for non-precedential opinions. (There was a 23% increase for precedential opinions and a 533% increase for non-precedential opinions.) The increase

50. Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923 (2016).
51. Octane Fitness, LLC v. Icon Health & Fitness, Inc., 134 S. Ct. 1749 (2014).
52. Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 134 S. Ct. 1744 (2014).
53. *Octane Fitness*, 134 S. Ct. at 1756; *see also* 35 U.S.C. § 285 (2012).
54. *Octane Fitness*, 134 S. Ct. at 1749.
55. Kappos v. Hyatt, 132 S. Ct. 1690 (2012).
56. Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131 (2016).
57. *Kappos*, 132 S. Ct. at 1700–01; *see also* 35 U.S.C. § 145 (2012).
58. *Cuozzo*, 136 S. Ct. at 2139–42; *see also* 35 U.S.C. § 314(d) (2012).
59. Bilski v. Kappos, 561 U.S. 593 (2010).
60. Mayo Collaborative Servs. v. Prometheus Labs., Inc., 132 S. Ct. 1289 (2012).
61. Ass'n for Molecular Pathology v. Myriad Genetics, 133 S. Ct. 2107 (2013).
62. Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 134 S. Ct. 2347 (2014).

is even more pronounced in the district courts where the number of cases raising § 101 issues has increased over 170%. A similar trend is currently underway with respect to attorney's fees after the Court's recent decisions in *Octane Fitness*[63] and *Highmark*.[64]

| **Federal Circuit** | | | | | | |
|---|---|---|---|---|---|---|
| | Precedential | | Non-Precedential | | All Cases | |
| | Total | Average per Year | Total | Average per Year | Total | Average per Year |
| Pre-*Bilski* | 39 | 7.8 | 3 | 0.6 | 42 | 8.4 |
| Post-*Bilski* | 48 | 9.6 | 19 | 3.8 | 67 | 13.4 |
| Change | 9 | 23.1% | 16 | 533.3% | 25 | 59.5% |
| **District Courts** | | | | | | |
| | Precedential | | Non-Precedential | | All Cases | |
| | Total | Average per Year | Total | Average per Year | Total | Average per Year |
| Pre-*Bilski* | 82 | 16.4 | 121 | 24.2 | 203 | 40.6 |
| Post-*Bilski* | 171 | 34.2 | 382 | 76.4 | 553 | 110.6 |
| Change | 89 | 108.5% | 261 | 215.7% | 350 | 172.4% |

**TABLE 3:** Decisions Citing § 101 in the Federal Circuit and District Courts[65]

## V

Very few of the Federal Circuit cases reviewed by the Supreme Court involve circuit splits. By my estimation, only one over the last decade.[66] And a study from 2013 found a total of only eight in the history of our court.[67] This is understandable since our jurisdiction is exclusive, with some exceptions, such as federal tax cases and some whistleblower cases. It has been suggested by some that the system would benefit by creating

63. Octane Fitness, LLC v. Icon Health & Fitness, Inc., 134 S. Ct. 1749 (2014).

64. Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 134 S. Ct. 1744 (2014).

65. These statistics were generated by simple Westlaw searches for opinions citing to 35 U.S.C. § 101 during the five-year periods before and after the Supreme Court's decision in *Bilski*—June 1, 2005 to June 1, 2010 and June 1, 2010 to June 1, 2015.

66. *See* Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571 (2008). *But see* Mark S. Davies, *Seeking Supreme Court Review In Patent Cases*, LAW360 (Apr. 21, 2008) (stating that "*KSR* and *Medimmune* alleged a circuit split by pointing to cases decided before the Federal Circuit was established").

67. Ryan Stephenson, Note, *Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis*, 102 GEO. L.J. 271, 275 (2013).

circuit splits in patent cases.[68] This strikes me as a highly undesirable proposal. It would deprive the patent community of the very benefit that creation of the Federal Circuit was designed to confer—greater uniformity and certainty in patent law. In my view we should be working in the opposite direction—acting to foster greater certainty to avoid the excessive amount of patent litigation that now exists. Interestingly, in *Holmes v. Vornado*[69] the Supreme Court, and Justice Steven's concurring opinion in particular, suggested that channeling some patent cases to other circuits might be desirable, and allowed patent claims raised as counterclaims to go to the regional circuits.[70] Congress apparently disagreed, overruling that decision in short order.[71]

What is interesting, though, is that a significant proportion of the Supreme Court's cases from our court involve reconciling our jurisprudence with jurisprudence in other areas. In other words, the Supreme Court thinks that part of its task is to bring to bear its generalist perspective on our specialty areas.

A few examples include *eBay*,[72] *Commil*,[73] *Medtronic*,[74] *Medimmune*,[75] *Zurko*,[76] *Octane Fitness*,[77] *Teva*,[78] and *Highmark*.[79] For instance, in *eBay* the Court sought to make sure that the standard for injunctive relief in the patent area is the same as for other federal causes of action.[80] In *Commil* the Court brought its understanding of civil and criminal liability to bear on the issue of induced infringement where an actor lacks actual knowledge that the conduct violates the law.[81] And in *Medtronic* and *Medimmune* the Court clarified the constitutional and procedural dimensions to the Declaratory Judgment Act in the context of

68. John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518 (2010); Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. L. REV. 1619 (2007); Hon. Diane P. Wood, *Keynote Address: Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1 (2013).

69. Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002).

70. *See id.* at 838–39.

71. *See* Leahy-Smith America Invents Act, § 19, 125 Stat. 284, 331–32 (2011) (codified as amended at 28 U.S.C. §§ 1295(a)(1) and 1338(a)).

72. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

73. Commil USA, LLC v. Cisco Sys., Inc., 135 S. Ct. 1920 (2015).

74. Medtronic, Inc. v. Mirowski Family Ventures, LLC, 134 S. Ct. 843 (2014).

75. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007).

76. Dickinson v. Zurko, 527 U.S. 150 (1999).

77. Octane Fitness, LLC v. Icon Health & Fitness, Inc., 134 S. Ct. 1749 (2014).

78. Teva Pharms. USA, Inc. v. Sandoz, Inc., 135 S. Ct. 831 (2015).

79. Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 134 S. Ct. 1744 (2014).

80. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391–94 (2006).

81. Commil USA, LLC v. Cisco Sys., Inc., 135 S. Ct. 1920,1928–30 (2015).

patent litigation.[82] In a number of other cases, such as *Zurko*, *Octane Fitness*, *Teva*, and *Highmark*, the Court's generalist perspective, especially on issues of procedure and standards of appellate review of decisions, has pervaded its opinions.

## VI

As this perhaps suggests, our court is viewed by the Supreme Court, and indeed, by the other circuits as inhabiting a world apart. This is due in large part to the fact that we have no criminal jurisdiction, hear few constitutional issues, and almost no cases involve state-law issues. Some of our non-patent jurisdiction involves issues similar to cases in other circuits—contract law, takings, administrative law—but increasingly our jurisdiction is composed of patent cases.

When I joined the Federal Circuit sixteen years ago, around 33% of our docket consisted of patent cases;[83] for fiscal year 2016 it was 63%.[84] It is interesting to note that when the Federal Circuit was first created, estimates were that patent cases would make up only 12% of the court's total caseload.[85] That estimate proved to be quite inaccurate.

Our patent cases mainly come from three sources: the district courts, the Patent Office, and the International Trade Commission, but a few also come from the Court of Federal Claims. The proportion of patent cases coming from the district courts has not increased during my time on the court. Rather, the most substantial growth is in cases coming from the Patent Office.[86] In 2000, cases from the Patent Office made up only 4% of our docket while in 2016 they were 33%.[87] Indeed, as some predicted,[88] appeals from the Patent Office have overtaken those from the district courts.[89]

82. Medtronic, Inc. v. Mirowski Family Ventures, LLC, 134 S. Ct. 843, 849–52 (2014); MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126–37 (2007).

83. *Appeals Filed, by Category—FY 2000* (on file with author).

84. *Appeals Filed, by Category—FY 2016*, CAFC.USCOURTS (2016), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/FY16_Caseload_by_Category.pdf.

85. *See* Hon. Pauline Newman, *Foreword: The Federal Circuit in Perspective*, 54 AM. U. L. REV. 821, 824 (2005).

86. *See Appeals Filed, by Category—FY 2000*, *supra* note 83; *Appeals Filed, by Category—FY 2016*, *supra* note 84.

87. *See Appeals Filed, by Category—FY 2000*, *supra* note 83; *Appeals Filed, by Category—FY 2016*, *supra* note 84.

88. *See, e.g.*, Jason Rantanen, *Federal Circuit Now Receiving More Appeals Arising from the PTO than the District Courts*, PATENTLYO (Mar. 2, 2016), http://patentlyo.com/patent/2016/03/receiving-appeals-district.html

89. *Appeals Filed, by Category—FY 2016*, *supra* note 84.

And these percentages understate the percentage of actual workload for patent cases, which is probably on the order of 80%. This growing trend to patent dominance has increased our isolation, and the sense of our uniqueness, which I think is highly undesirable. Perhaps the best antidote involves a legislative solution—Congress could reconfigure our court's jurisdiction by adding other non-patent jurisdiction, though one recent effort to give us jurisdiction over all immigration cases proved to be ill-considered and was abandoned.[90]

## VII

Another feature of our relationship with the Supreme Court lies in the lack of communication between the two courts. In the past several years we have done a good job I think in opening lines of communication with the district courts that hear patent cases at the trial level, inviting district court judges to sit with us, sitting as trial judges by designation in district courts, and participating in conferences with district court judges.

No comparable lines of communication exist with respect to the Supreme Court or its justices. And this is somewhat unlike the situation that exists with respect to other circuits. As to some of them, justices were members of those circuits and keep up with their former colleagues. And the Supreme Court repeatedly takes clerks from most if not all of the other circuits. The Supreme Court, of course, has no justices from our court and has had only one law clerk from our court. So too, unlike other circuits, our judicial conference is held in a single day in Washington, D.C. to make possible broad attendance by the bar, particularly by government lawyers. This format does not encourage informal communication with the justices.

So our communication with the Supreme Court is largely limited to our respective opinions which, of course, is how courts communicate about the legal issues that come before them. We have sometimes had difficulty interpreting the Supreme Court decisions in the patent area, hampering our understanding of what the Court wants us to do. Ironically, while the Supreme Court does take many of our cases, it does not take that many, limiting the opportunities for the Supreme Court to communicate its views to our court.

Our communication as well has somewhat been lacking in clarity. While some of the Supreme Court patent cases result from en banc

90. *See, e.g.*, Securing America's Borders Act, S. 2454, 109th Cong. § 501 (2006); Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1497 (2012); Marius Meland, *Immigration Critics Would Swamp Federal Circuit, Critics Say*, LAW360 (Mar. 21, 2006), http://www.law360.com/articles/5784/immigration-bill-would-swamp-federal-circuit-critics-say.

decisions where contrasting views and relevant policy considerations have typically been vetted at length, many other cases come from panel decisions, some of which have been non-precedential. For instance, over the last ten terms, the vast majority—74%—of our patent cases reviewed by the Supreme Court were precedential panel decisions,[91] only 17% were en banc decisions[92] where the majority and dissent often speak directly to the Supreme Court, and nearly 9% were non-precedential decisions[93] in which the legal principle was established years earlier.

Panel decisions, such as *Commil*, *Teva*, *Highmark*, *Medtronic*, and *Ebay*, and especially non-precedential ones, such as *KSR*, are unlikely to explore or discuss the underlying reasons for the legal principle being articulated. And while our bar includes many sophisticated Supreme Court advocates and in general has done a good job in Supreme Court cases, commentators have suggested that neither the Solicitor General's office nor the private bar has always done a good job of helping the Supreme Court understand the realities of the patent world—bridging the gulf between the Supreme Court and our court.[94] Compounding this is the complex

91. *See In re* Cuozzo Speed Techs., LLC, 793 F.3d 1268 (Fed. Cir. 2015), *aff'd*, 136 S. Ct. 2131 (2016); Halo Elecs., Inc. v. Pulse Elecs., Inc., 769 F.3d 1371 (Fed. Cir. 2014), *vac'd*, 136 S. Ct. 1923 (2016); Commil USA, LLC v. Cisco Sys., Inc., 720 F.3d 1361 (Fed. Cir. 2013), *vac'd*, 135 S. Ct. 1920 (2015); Teva Pharms. USA, Inc. v. Sandoz, Inc., 723 F.3d 1363 (Fed. Cir. 2013), *vac'd*, 135 S. Ct. 831 (2015); Biosig Instruments, Inc. v. Nautilus, Inc., 715 F.3d 891 (Fed. Cir. 2013), *vac'd*, 134 S. Ct. 2120 (2014*);* Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 687 F.3d 1300 (Fed. Cir. 2012), *vac'd*, 134 S. Ct. 1744 (2014); Medtronic, Inc. v. Boston Sci. Corp., 695 F.3d 166 (Fed. Cir. 2012), *rev'd*, 134 S. Ct. 843 (2014); Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office, 689 F.3d 1303 (Fed. Cir. 2012), *aff'd-in-part and rev'd-in-part*, 133 S. Ct. 2107 (2013); Monsanto Co. v. Bowman, 657 F.3d 1341 (Fed. Cir. 2011), *aff'd*, 133 S. Ct. 1761 (2013); Novo Nordisk A/S v. Caraco Pharm. Labs., Ltd., 601 F.3d 1359 (Fed. Cir. 2010), *rev'd*, 132 S. Ct. 1670 (2012); Prometheus Labs., Inc. v. Mayo Collaborative Servs., 628 F.3d 1347 (Fed. Cir. 2010), *rev'd*, 132 S. Ct. 1289 (2012); i4i Ltd. P'ship v. Microsoft Corp., 598 F.3d 831 (Fed. Cir. 2010), *aff'd*, 564 U.S. 91 (2011); Board of Tr. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 583 F.3d 832 (Fed. Cir. 2009), *aff'd*, 563 U.S. 776 (2011); SEB S.A. v. Motgomery Ward & Co., Inc., 594 F.3d 1360 (Fed. Cir. 2010), *aff'd*, 563 U.S. 754 (2011); LG Elecs., Inc. v. Bizcom Elecs., Inc., 453 F.3d 1364 (Fed. Cir. 2006), *rev'd*, 553 U.S. 617 (2008); AT&T Corp. v. Microsoft Corp., 414 F.3d 1366 (Fed. Cir. 2005), *rev'd*, 550 U.S. 437 (2007); MedImmune, Inc. v. Genentech, Inc., 427 F.3d 958 (Fed. Cir. 2005), *rev'd*, 549 U.S. 118 (2007).

92. *See* CLS Bank Int'l v. Alice Corp. Pty. Ltd., 717 F.3d 1269 (Fed. Cir. 2013), *aff'd* 134 S. Ct. 2347 (2014); Akamai Techs., Inc. v. Limelight Networks, Inc., 692 F.3d 1301 (Fed. Cir. 2012), *rev'd* 134 S. Ct. 2111 (2014); Hyatt v. Kappos, 625 F.3d 1320 (Fed. Cir. 2010), *aff'd* 132 S. Ct. 1690 (2012); *In re* Bilski, 545 F.3d 943 (Fed. Cir. 2008), *aff'd* 561 U.S. 593 (2010).

93. *See* Icon Health & Fitness, Inc. v. Octane Fitness, LLC, 496 Fed. Appx. 57 (Fed. Cir. 2012), *rev'd* 134 S. Ct. 1749 (2014); Teleflex Inc. v. KSR Int'l Co., 119 Fed. Appx. 282 (Fed. Cir. 2005), *rev'd* 550 U.S. 398 (2007).

94. *See, e.g.*, Timothy B. Lee, *The Supreme Court Doesn't Understand Software, and That's a Problem*, VOX (June 20, 2014), http://www.vox.com/2014/6/20/5824426/the-supreme-court-doesnt-understand-software-and-thats-a-problem; Lyle Denniston, *Argument Recap—Analogies to the Rescue*, SCOTUSBLOG (Apr. 15, 2013), http://www.scotusblog.com/2013/04/argument-recap-analogies-to-the-rescue/; Mark Joseph Stern, *Scalia on DNA Patents: I Don't Really Understand Science*, SLATE (June 13, 2013),

technology involved in many cases that presents what can be called a technological barrier to understanding our jurisprudence.

Recently, in one case some of us spoke directly to the Supreme Court about the need to consider clarification to Supreme Court jurisprudence in certain § 101 cases.[95]

## VIII

There is a perceived tension between the Supreme Court and our court by the bar and by the academy. We and the Supreme Court appear to be united in agreeing that patent law is important, but there is often a perception that the Supreme Court on the one hand, views us as having a parochial attitude or a we know best attitude toward patent law, as being deeply divided, and as being overly patent-friendly. On the other hand, our bar and the academy have expressed skepticism that the Supreme Court understands patent law well enough to make the governing rules—an attitude not likely to be endearing to the Supreme Court. As two commentators have uncharitably asked: "Is the Supreme Court too unsophisticated in patent law to appreciate the wise insights of expert Federal Circuit judges, or are those Federal Circuit judges too narrowly focused on patent law to appreciate the broader rules of jurisprudence, procedure, and statutory interpretation?"[96]

These attitudinal differences are not often overtly articulated by justices and judges, though comments made by justices during oral argument have sometimes painted us as parochial. But one difference is clearly evident. Our court, in keeping with the legislative history of our statute, views our task as in part articulating clear rules; the Supreme Court on the other hand views clear rules as often suspect.

For example, in *Octane Fitness* the Court characterized the standard from our *Brooks Furniture* opinion for determining "exceptional cases" under the fee shifting provision of the Patent Act—35 U.S.C. § 285 (2012)—as "superimpos[ing] an inflexible framework onto statutory text that is inherently flexible."[97] Instead, the Court articulated a flexible,

http://www.slate.com/blogs/future_tense/2013/06/13/myriad_dna_patenting_supreme_court_case_scalia_says_he_doesn_t_get_the_science.html.

95. *See Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371 (Fed. Cir. 2015), *reh'g denied*, 809 F.3d 1282 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 2511 (2016).

96. Jeff Bleich & Josh Patashnik, *The Federal Circuit Under Fire*, S.F. ATT'Y, Fall 2014, at 40, 41–42.

97. Octane Fitness, LLC v. Icon Health & Fitness, Inc., 134 S. Ct. 1749, 1756 (2014).

totality of the circumstances approach for district courts to exercise their discretion.[98]

Similarly, the Court in *Halo* rejected our court's two-part *In re Seagate* test for awarding enhanced damages under the Patent Act, which required findings of both objective and subjective recklessness, as "unduly rigid" and "impermissibly encumber[ing] the statutory grant of discretion to district courts."[99] Again, the Court placed greater discretion with district courts to consider the particular circumstances of each case in deciding whether to award enhanced damages.[100]

In *Festo*, our court adopted a complete bar against any claim of equivalence where prosecution history estoppel applied.[101] The Supreme Court rejected this "rigid" framework and again adopted a more flexible approach with a rebuttable presumption for prosecution history estoppel.[102]

And in *KSR*, the Court rejected our court's "teaching, suggestion, or motivation" test for obviousness.[103] Instead, the Court noted that this test provides a "helpful insight" but that it should "not become [a] rigid mandatory formula."[104]

It would be interesting to consider whether the Supreme Court's aversion to bright-line rules in the patent area exists as well in other areas of statutory construction.

## IX

Given the significant number of our cases that have gone to the Supreme Court, it should not be surprising that a significant part of our task lies in interpreting recent Supreme Court decisions. And indeed, the Supreme Court has often explicitly left that task to us. For instance, in *Warner-Jenkinson* the Court concluded its opinion with: "We expect that the Federal Circuit will refine the formulation of the test for equivalence in the orderly course of case-by-case determinations, and we leave such refinement to that court's sound judgment in this area of its special expertise."[105] And recently, Justice Breyer's concurring opinion in *Halo* clarified that "in applying [the abuse of discretion] standard [for enhanced

98. *See id.* at 1756–57.
99. Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1932 (2016).
100. *See id.* at 1932–34.
101. Festo Corp. v. Shoketsu Kinzoku Kabushiki Co., Ltd., 535 U.S. 722, 730 (2002).
102. *Id.* at 738–41.
103. KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 422 (2007).
104. *Id.* at 419.
105. Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co., 520 U.S. 17, 40 (1997).

damages], the Federal Circuit may take advantage of its own experience and expertise in patent law."[106]

But we are not merely charged with interpreting recent cases. Some of the most significant patent jurisprudence is not the product of a detailed statute but of Supreme Court decisions that have created extra-statutory requirements for patentability. Thus in the area of § 101—subject matter eligibility—the Supreme Court has recognized that the exceptions for laws of nature, natural phenomena, and abstract ideas are judicially created.[107] So too with respect to obviousness the doctrine was created by the Supreme Court long before its incorporation into the statute in 1952.[108] Thus, older Supreme Court cases remain highly relevant in interpreting the doctrines.

## X

Like other circuits, we must accommodate ourselves to the inevitable delay in the Supreme Court review process, which may take years to resolve important legal issues. Of course delay is both understandable and inherent in Supreme Court review. For instance, parties have 90 days to file for certiorari,[109] the Court's term lasts only from October through June, and it can take only a limited number of merits cases each year. But some delays are unique for patent litigation. In many patent cases where the government is not a party, the Court requests the views of the Solicitor General's office before making a decision on whether to grant certiorari.[110] The views of the Solicitor General, especially at the certiorari stage, provide the Court with an additional barometer by which to measure "certworthiness,"[111] but seeking those views may delay the process of Supreme Court review.

106. Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1938 (2016) (Breyer, J., concurring).

107. *See, e.g.*, Bilski v. Kappos, 561 U.S. 593, 601–02 (2010) ("The Court's precedents provide three specific exceptions to § 101's broad patent-eligibility principles: 'laws of nature, physical phenomena, and abstract ideas.' While these exceptions are not required by the statutory text, they are consistent with the notion that a patentable process must be 'new and useful.'") (citations omitted).

108. *See* Hotchkiss v. Greenwood, 52 U.S. 248, 267 (1851).

109. Sup. Ct. R. 13.1.

110. *See, e.g.*, *Duffy*, *supra* note 68, at 525–38; *Stephenson*, *supra* note 67, at 282, 285–86 ("Between 1994 and 2007, the Supreme Court requested the views of the Solicitor General in seventeen Federal Circuit patent cases and did not follow the Solicitor General's recommendation on whether to take the case only twice. Most significantly, patent cases accounted for over 10% of the Court's [Calls for Views of the Solicitor General] orders between 2000 and 2008, a time where patent cases only took up 2.25% of the Supreme Court's docket.") (citations omitted).

111. *Duffy*, *supra* note 68, at 536 ("If the Supreme Court wanted some metric by which it could gauge whether the Federal Circuit as a whole had erred, it needed to find some novel way to evaluate certiorari petitions in patent cases. The [Calls for Views of the Solicitor General] mechanism appears to have filled that need. Since the 2000 Term, the Court has referred to the Solicitor General many more

Other factors may delay Supreme Court resolution of the issues. For some issues that have already reached our court and been resolved, it takes time for them to reach the Supreme Court for review. For example, this was true in *KSR* where the "teaching, suggestion, or motivation" test originated with our predecessor court in the early 1960s[112] yet only reached the Supreme Court in 2007. While comparatively much quicker, the delay in the Supreme Court's review of the *In re Seagate* standard for enhanced damages this past term in *Halo* was also significant—nine years from 2007 to 2016.[113] Supreme Court delay in resolving issues can be beneficial in cases from the regional circuits where it allows the issue to percolate and be addressed by multiple courts, but that justification has less force where the Federal Circuit has exclusive jurisdiction.[114] Nevertheless, the Supreme Court does benefit in some cases by allowing our court to refine and clarify the scope of our decisions, and to enable the Court to better understand the consequences over a broad range of cases.

## CONCLUSION

In looking to the future and what the next ten years have in store, I imagine my prediction will again hold that the Supreme Court will continue to take our cases and many of those will involve substantive patent law. Since I wrote that foreword a decade ago, patent law has only moved further into the mainstream. And the importance of intellectual property to the broader American economy has continued to grow, with an estimated 84% of the S&P 500 Market Value attributable to intangible assets in 2015.[115] While we and the Supreme Court agree that patent law is important and while I continue to think that Supreme Court review of our

certiorari petitions in patent cases than would be expected based on either (i) historical practice, or (ii) the percentage of patent cases on the Court's merits docket.").

112. *See* KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 418 (2007) ("When it first established the requirement of demonstrating a teaching, suggestion, or motivation to combine known elements in order to show that the combination is obvious, the Court of Customs and Patent Appeals captured a helpful insight.") (citing to *In re* Bergel, 48 C.C.P.A. 1102, 292 F.2d 955, 956–57 (1961)).

113. *See* Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923 (2016); *see also In re* Seagate Tech., LLC, 497 F.3d 1360 (Fed. Cir. 2007).

114. *See, e.g.*, Rochelle C. Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 SMU L. REV. 505 (2013).

115. *See Annual Study of Intangible Asset Market Value from Ocean Tomo, LLC*, OCEANTOMO (Mar. 5, 2015), http://www.oceantomo.com/2015/03/04/2015-intangible-asset-market-value-study/ ("[T]he components of S&P market value data for the start of 2015 reveals the implied intangible asset value of the S&P 500 grew to an average [of] 84% by January 1, 2015 a growth of four percentage points over ten years."); *see also* Geoff Colvin, *How to Build the Perfect Workplace*, FORTUNE (Mar. 5, 2015), http://fortune.com/2015/03/05/perfect-workplace/ ("Intangible assets, mostly derived from human capital, have rocketed from 17% of the S&P 500's market value in 1975 to 84% in 2015, says the advisory firm Ocean Tomo.").

cases is both essential and highly beneficial, my hope is that both our courts can foster greater mutual understanding and open further channels of communication. After all, as Professor Rochelle Dreyfuss has observed, both institutions "are caught in the Hruska Commission's experiment" and we "must . . . figure out how a judiciary largely committed to generalist adjudication should deal with a court that is so differently constituted."[116]

116. Rochelle C. Dreyfuss, *What the Federal Circuit Can Learn from the Supreme Court—and Vice Versa*, 59 AM. U. L. REV. 787, 794 (2010).